

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Part 20 and 24 of the)
Commission's Rules -- Broadband PCS)
Competitive Bidding and the Commercial)
Mobile Radio Service Spectrum Cap)

Amendment of the Commission's Cellular)
PCS Cross-Ownership Rule)

WT Docket No. 96-59

GN Docket No. 90-314

To: The Commission

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REPLY COMMENTS OF DCR COMMUNICATIONS, INC.

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SUMMARY

DCR Communications, Inc., a small, minority and woman-owned business whose subsidiary is a bidder in the pending C block PCS auction, supports the Commission in its efforts to provide small businesses and other designated entities with a meaningful opportunity to compete for PCS licenses and succeed in the competitive wireless marketplace. DCR therefore is particularly concerned about proposals before the Commission that would penalize C block winners for their entrepreneurial success, contrary to the Commission's prior view. The rules concerning preferences for the 10 MHz licenses should be designed so as to maximize opportunities for all small businesses. Moreover, the Commission should adhere to its long established policies concerning cellular-PCS ownership and attribution, designed to prevent meaningful influence over these new entrants by incumbent CMRS providers with minimal incentive to contribute to competition or diversity.

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Amendment of the Commission's Cellular PCS Cross-Ownership Rule)	GN Docket No. 90-314

To: The Commission

REPLY COMMENTS OF DCR COMMUNICATIONS, INC.

DCR Communications, Inc. ("DCR") respectfully submits
its reply comments in the above-captioned matter.^{1/}

I. ELIGIBILITY OF C BLOCK APPLICANTS FOR 10 MHZ
PREFERENCES

A number of commenters have suggested that successful
applicants in the C block auction (and in some cases, even
unsuccessful applicants^{2/}) should be disqualified from receiving
any small business preferences with regard to 10 MHz licenses and
from participating in the F block auction.^{3/} These commenters
generally propose changing the financial caps or counting the C

^{1/} NPRM, FCC 96-119 (released March 20, 1996).

^{2/} See Comments of National Telecom at 4.

^{3/} See, e.g., id., Comments of Roseville Telephone Co. at 3-4; Comments of Rendall & Associates at 6-7, 8-9, 11; Comments of Iowa L.P. at 6; Comments of Phoenix, L.L.C. at 4; Comments of North Coast Mobile Communications, Inc. at 7-8, 11, 12, 19; Comments of Airlink at 10-11.

block license or funds raised by C block applicants toward an F block applicant's financial eligibility.

Such a result would be entirely unfair to entities that relied on the Commission's rules in structuring their bid to participate in the offering of PCS. DCR, for example, is a start-up venture that was created in order to participate (through its wholly-owned subsidiary) in the C and F block auctions as a small, minority and woman-owned business. It has minimal assets^{4/} and has not yet earned gross revenues. However, due to a sound business plan and a staff with technical expertise and relevant experience, DCR has been fortunate enough to attract investors willing to help provide significant financing that the Commission has recognized to be necessary to acquire PCS licenses, build out PCS systems, and compete with entrenched cellular and A/B block PCS providers.^{5/} In doing so, both DCR and its investors took into account that the company would be eligible to bid for C and F block licenses and to qualify for whatever bidding credits, installment payment terms, and

^{4/} DCR believes that most C block applicants are start-up ventures and therefore do not and will not for some time have significant gross revenues. Therefore, there is no point in changing the gross revenues cap for F block participants as some commenters suggest. See e.g. Comments of Columbia Cellular, Inc. at 1; Comments of Integrated Communications Group Corp. at 1; Comments of Opportunities Now Enterprises (One) Inc. at 1. DCR believes that concerns about the possibility that bidders could be "fronts" for large businesses rather than true small businesses would be better addressed by scrutinizing all applicants for compliance with the Commission's rules. See Comments of Omnipoint at 2, 4-5.

^{5/} Fifth Report and Order, 9 FCC Rcd 5532, 572 (1994).

discounted upfront and downpayment requirements might be available to companies that met the Commission's qualifications. As recognized in Omnipoint Corp. v. FCC, No. 95-1374, ___ F.3d ___ (D.C.Cir. 1996),^{6/} such reliance interests carry significant weight in the context of these auctions.^{7/}

Reliance on this expectation was entirely reasonable given that throughout the process of creating the designated entity rules, the Commission has never differentiated between its rules for the C and F blocks. It has consistently addressed the designated entity provisions and preferences in terms of both blocks. The first time that the two blocks were treated differently was when the Commission was forced to reconsider its C block minority and gender preferences in the wake of Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995). Even at that point, there was no reason to believe that the Commission would at some point revisit the baseline eligibility rules for participation in the F block, and thus the F block has always been a potential part of DCR's and many other C block applicants' business plans.

As discussed in DCR's initial comments, the Commission's rules clearly indicate that the C block licenses

^{6/} Slip op. at 15, 18, 24.

^{7/} The Commission has recognized from the start that some C block applicants that succeeded in obtaining a C block license would require an additional 10 MHz of spectrum in order to realize their business plans. See Memorandum Opinion and Order, 9 FCC Rcd 4957, 4981 (1994). The F block auction was understood to be the primary opportunity by which the additional spectrum might be obtained.

will not count in the calculation of a license applicants' total assets (whether for the F block or the transfer of any designated entity license).^{8/} Those rules are designed to encourage small businesses to flourish and to maintain control of designated entity licenses for as long as possible.^{9/} As the Commission has stated, it "has a strong interest in seeing entrepreneurs grow and succeed in the PCS marketplace."^{10/} It is therefore essential that the licenses small businesses win at the C block auction not be counted towards the total assets cap.

Under the Commission's small business rules, DCR, a start-up venture with no significant assets or pre-existing ties to any other firm has been able to raise funds and compete actively for PCS licenses. The fact that DCR has done so, and that it may be able (if it ultimately wins in the C block auction and is granted C block licenses) to enter the highly competitive cellular-PCS market does not make it a large or established business. It is still very much a start-up business, which will acquire significant debt associated with any C block licenses it receives. The ability of some C block bidders to raise funds or

^{8/} See Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 420 (1994) (normal revenues from growth not disqualifying); 47 C.F.R. § 27.111(c)(3) (normal growth from operations will not affect continued eligibility for installment payments).

^{9/} It would be inconsistent with this policy as well as inequitable for the Commission now to count C block licenses or funds raised to participate in the C block auction against C block participants. See Comments of Sprint Corp. at 7; Comments of WPCS, Inc. at 2, 5; Comments of Virginia PCS Alliance, L.C. at 4-5; Comments of Devon Mobile Communications, L.P. at 10-11.

^{10/} Fifth M & O, 10 FCC Rcd at 420.

compete in the auction simply demonstrates that due to the Commission's rules and incentives, some small, start-up companies have been given a realistic opportunity to compete.^{11/} This is precisely the goal articulated by Congress: the promotion of economic opportunity and competition. 47 U.S.C. § 409(j)(3)(b). The success of small businesses in rising to the occasion offered by the C block should not be penalized.^{12/}

Moreover, the suggestion that applicants are not small businesses because they have been able to bid large amounts for licenses is simply inaccurate. Few C block participants have the funds to pay immediately the large sums that have been bid; these sums will be paid over time via the Commission's installment payment plan, which was established because the Commission fully recognized the financial difficulties these new entrants will face.^{13/} Thus, DCR believes that it is essential that the Commission permit C block participants (whether or not ultimately successful in obtaining licenses) to be eligible for F block or any other 10 MHz licenses preferences.^{14/}

^{11/} See Comments of the Personal Communications Industry Association at 8 ("[T]he FCC's current regulatory scheme . . . allows applicants to attract investment and stimulates the formation of economically viable enterprises.")

^{12/} Id.

^{13/} See Fifth Report and Order, 9 FCC Rcd at 5593.

^{14/} DCR similarly does not believe that C block bidders should be forced into the D and E blocks, as some commenters suggest, even if they are given bidding preferences in those blocks. See, e.g., Comments of Coalition of New York Rural Telephone Companies at 5; Comments of Liberty Cellular at 7.

(continued...)

II. THE COMMISSION SHOULD NOT INCREASE THE UPFRONT PAYMENT OR DOWNPAYMENT REQUIREMENT FOR F BLOCK LICENSES

Some commenters have suggested that the Commission should raise the upfront payment requirement to deter the type of speculative bidding they allege has occurred in the C block.^{15/} There is no basis for this type of change in the rules. While the bids in the C block have been higher than expected, there is no reason to believe that bidders will be unable to make their downpayments or scheduled installment payments. Indeed, numerous commenters in this proceeding were once C block participants and responsibly dropped out when they no longer believed that they could meet the payments demanded by rising license prices.^{16/} Bidders remaining in the auction presumably believe that they will be able to raise the necessary capital. Moreover, all

^{14/} (...continued)

While designated entities should be permitted to bid for D and E block licenses, and DCR believes that they should have the full panoply of bidding preferences in doing so, they should not be excluded from the F block. Each C block applicant must decide for itself whether it has the means to compete with the large companies that will doubtless bid for the D and E block licenses. Mere success in the C block does not demonstrate an ability to compete with such companies: Indeed, the C block auction may have strained the resources of some C block participants to the point where competing against large companies for the D and E block licenses would be impossible. These small companies therefore must not be shut out of the F block, which may be the only opportunity available to them for 10 MHz licenses.

^{15/} See, e.g., Comments of Cook Inlet at 5-6; Comments of GO Communications, Corp.; Comments of Personal Connect Communications at 3; Comments of AT&T Wireless Services, Inc. at 7-8; Comments of Airlink at 8-10; Comments of Sprint Corp. at 4-5.

^{16/} See, e.g., Comments of Airlink at 1-2; Comments of North Dakota Investment Trust at 2.

bidders participating in the C block auction or applying for the F block (and D and E blocks) are on notice that the Commission intends to enforce strictly the default penalties established in its rules.

Until and unless there is evidence to the contrary, there is no basis for the Commission to treat bidders as if they are irresponsible entities. To do so would unfairly penalize responsible bidders who need and have relied in their business plans on the discounts and other preferences in order to have a realistic opportunity to compete in the auctions.^{17/}

III. THE D, E, AND F BLOCK LICENSES SHOULD BE AUCTIONED SIMULTANEOUSLY WITH SMALL BUSINESS PREFERENCES FOR LICENSES IN ALL THREE BLOCKS

Several commenters suggest that the small business preferences should not be extended to the D and E blocks, and many commenters also suggest that the auctions should be held separately.^{18/} DCR believes that separating these blocks and

^{17/} Numerous commenters have noted that the discounts are necessary in order to provide small businesses a realistic opportunity to compete -- especially those hoping to offer niche services. See e.g., Comments of Personal Communications Industry Association at 12 (10 MHz license applicants will face same cash flow problems as C block applicants and that the former may be even riskier investments than the latter); Comments of Mid-Plains Telephone, Inc. at 4-5; Comments of WPCS, Inc. at 6 (raising these payments could hinder access to capital for small businesses); Comments of Virginia PCS Alliance, L.C. at 7.

^{18/} See, e.g., Comments of Radiofone at 5-7; Comments of Telephone & Data Systems, Inc. at 8; Comments of AT&T Wireless Services, Inc. at 5; Comments of Sprint Corp. at 7-8. Some commenters believe that the auctions should be held simultaneously, although they believe that small business preferences should be restricted to the F block. See, e.g.,
(continued...)

limiting the preferences would be a serious mistake -- quite apart from the significant delays and association competitive disadvantages that the Court recognized in Omnipoint.^{19/}

In retrospect, it now appears that the C block auction may have enhanced license prices because it was the last option for some companies to obtain a 30 MHz license. Meanwhile, the larger, well-financed businesses were permitted to obtain their licenses with less competition for lower prices.^{20/} Forcing small businesses into a single F block auction may have the same effect,^{21/} which would be distinctly unfair to small businesses -- and in conflict with recent legislation requiring precisely the opposite policy.^{22/} Moreover, permitting preferences in each block will provide small businesses with a realistic chance to obtain 30 MHz of spectrum in one geographic area, thereby introducing one more 30 MHz competitor into PCS markets. In this way, successful C block applicants can fill in gaps in their coverage or become stronger competitors in their existing markets by obtaining an additional 10 MHz of spectrum.

^{18/} (...continued)

Comments of Bell South at 14-16. DCR agrees that if the Commission decides to restrict small business preferences to the F block, the auctions should nonetheless be held concurrently.

^{19/} Slip op. at 12-13.

^{20/} See Comments of PCS Development Corp. at 9.

^{21/} See Comments of Personal Connect Communications at 1-2; Comments of Omnipoint Corp. at 4; Comments of Virginia PCS Alliance, L.C. at 6-7.

^{22/} Small Business Regulatory Fairness Act, H.R. 3136, 104th Cong., 2d Sess. (1976), P.L. 104-121, § 202 (a).

IV. THE CELLULAR-PCS SPECTRUM CAP RULES SHOULD BE MAINTAINED

Many commenters argue for a relaxation of the Commission's cellular-PCS cap, arguing that the rules are not necessary from an antitrust or competition-based perspective^{23/} and that the Commission should abandon its bright line attribution rules for a much more uncertain test concerning de facto control of the PCS licensee.^{24/}

The Commission has already considered the antitrust arguments presented by the commenters in this proceeding, and it has rejected them.^{25/} Moreover, these commenters have failed to demonstrate why an incumbent analog cellular operator in the market would have any incentive to introduce a second, digital PCS system in the same market, to introduce competitive prices or services for that system, or to switch its analog customers to digital cellular or PCS services. But in any event, as the Commission noted in its original consideration of those arguments, even if it were correct that cellular involvement in the PCS market presented no antitrust concerns, the Commission's

^{23/} See, e.g., Comments of Cellular Telecommunications Industry Association ("CTIA"); Comments of Western Wireless, Comments of AT&T Wireless Services, Inc., Comments of Bell South.

^{24/} See, e.g., Comments of CTIA at 14; Comments of Bell South at 11-12; Comments of AT&T Wireless Services, Inc. at 10.

^{25/} Third Memorandum Opinion and Order, 9 FCC Rcd 6908, ¶ 31 (1994).

spectrum cap rules serve a variety of public interest purposes and are not limited to antitrust policy.^{26/}

Specifically, the Commission (pursuant to the Congressional mandate as established in the 1993 Budget Act) is concerned with promoting diversity among providers of new services such as PCS, with ensuring that licenses for wireless services are not concentrated among a few entities, and with encouraging the introduction of new technologies. Providing scarce spectrum to entrenched cellular companies supports none of these goals and instead reduces the chance that new, small companies willing to invest in new technologies rather than build on preexisting systems will have the opportunity to do so.

As some commenters pointed out, requiring cellular providers to search out new markets in order to enter the PCS field is essential in order to promote diversity.^{27/} In this way, an entrenched cellular provider in one market can become a new provider in a different market, thereby providing consumers with another choice for wireless services. Clearly, no such choice would emerge if the cellular provider were permitted to simply aggregate spectrum in its own backyard. Moreover, there is a more realistic likelihood that a cellular provider in a new market without preexisting infrastructure of its own will actually use its PCS license to offer new or different service or

^{26/} Id. at ¶ 31.

^{27/} See Comments of TEC at 14; Comments of Mountain Solutions at 10-11.

service using new technology, rather than simply expanding its cellular subscriber base.^{28/} Consumers would clearly benefit from this diversity of options and services.

Commenters supporting abrogation of the spectrum cap point to the amount of spectrum a cellular licensee would be able to hold as compared to the overall amount of CMRS spectrum in each market. But it is not simply the amount of spectrum any one licensee controls that is relevant: cellular operators currently control large numbers of subscribers, and this is the relevant point in terms of the possibility of impeding the entry of new participants. Cellular duopolists currently control 100% of a not very competitive wireless market, command subscriber loyalty and name recognition, have no incentive to compete on price, technology or service in order to attract subscribers, and are well positioned to exclude any new entrant who tries to inject such competition.

Lastly, the Commission should not abandon its spectrum attribution test for a de facto control test. As the Commission has long recognized in the context of its multiple ownership rules in the broadcast and cable area, there is a clear advantage

^{28/} Western Wireless argues essentially that cellular licensees in rural areas should be permitted to obtain in-market PCS spectrum on a less restricted basis than in urban areas, because PCS licensees are less likely to build out in rural areas. However, a PCS licensee that has paid for a rural license will use that license; moreover, the Commission's build-out rules will monitor this requirement. Moreover, Western Wireless has not shown that cellular licensees in rural areas are likely to use PCS spectrum to offer new or innovative service rather than simply supplement their cellular service.

to predictable bright line tests rather than uncertain, fact-specific inquiries into de facto control. Moreover, control is not the Commission's concern in determining what level of investment should be considered a cognizable interest. Rather, the Commission is traditionally concerned with the potential for significant influence over management or operational decisions.^{29/} The Commission's 20% cellular attribution test (and 40% in the case of designated entities) is quite generous in this regard.^{30/} Influence is a concern where the Commission believes an investor might have incentives to wield that influence in an anticompetitive manner.^{31/} Where that concern is especially significant, as it is here, the Commission has generally, and reasonably, opted for a more rather than less inclusive attribution rule.^{32/} Cellular providers may have incentives to use their influence over a PCS licensee to reduce new competition, warehouse spectrum at least in certain areas to the extent possible, or require the use of preexisting technology or service offerings. Similar concerns have always been sufficient to support a strict attribution test.^{33/} The Commission has recognized these established principles in PCS,

^{29/} See Review of the Commission's Regulations Governing Attribution of Broadcast Interests, 10 FCC Rcd 3606, ¶¶ 20, 26-27 (1994).

^{30/} See id. (general rule is 5%).

^{31/} Id. ¶¶ 29-31.

^{32/} Id.

^{33/} Id.

Congress has since done so in the Telecommunications Act of 1996,^{34/} and the Commission should not abandon them here.^{35/}


^{34/} Pub. L. No. 104-104, § 3(a)(2)(33), 110 Stat. 56 (1996).

^{35/} If the Commission does relax either its attribution or spectrum cap rules, DCR believes it is essential that this be done prospectively only, so as not to cause extreme disruption to A/B licensees and C block applicants. As Telephone & Data Systems, Inc. notes, even a prospective rule change would be unfair to cellular providers that complied with the existing rules and divested themselves of cellular spectrum in order to participate in PCS. Comments of Telephone & Data Systems, Inc. at 4. But this problem pales in comparison with the massive havoc that would result from a retroactive rule change.

CONCLUSION

DCR supports the Commission's continuing efforts to provide meaningful opportunities for designated entities in the PCS market and advocates the suggestions outlined herein.

Respectfully submitted,

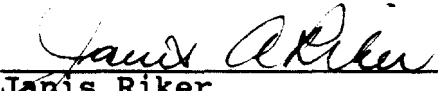

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 1996, a copy of the foregoing comments of DCR Communications, Inc. was served by first class mail, postage prepaid, except where hand delivery is otherwise indicated, to the names on the attached service list.



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